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No. 04 - 1034

In the
Supreme Court of the United States
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JOHN A. RAPANOS *et al.*,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of *Certiorari*
to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIÆ* CHARLES R. JOHNSON AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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BRIEF OF *AMICI CURIÆ* CHARLES R. JOHNSON AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIÆ*

Amici Charles R. Johnson ("Mr. Johnson") and New England Legal Foundation ("NELF") seek to bring to the Court's attention their views, and the views of the supporters of *Amicus Curiæ* NELF, concerning the authority of the Army Corps of Engineers to regulate filling of inland wetlands under 33 U.S.C. § 1344, Section 404 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA").[1]

Amicus Curiæ Charles R. Johnson is a 73 year-old cranberry farmer from Carver, Massachusetts. He purchased his first cranberry bog in 1958 and currently farms approximately 140 acres of cranberry bogs. *The Wetlands Permitting Process: Is It Working Fairly: Hearing Before the Subcommittee on Water Resources & Environment of the House Committee on Transportation and Infrastructure,* 107th Cong. 56 (Oct. 3, 2001) (statement of Charles R. Johnson) ("*Wetland Permitting Process*").

In 1999, the Environmental Protection Agency ("EPA") commenced a civil case in the United States District Court for the District of Massachusetts against Mr. Johnson, his wife, his son, and a family-owned limited partnership (collectively, "the Johnsons") for filling activity in wetlands associated with the creation and maintenance of his cranberry bogs, allegedly without a required permit under Section 404 of the Clean Water Act ("CWA"), 31 U.S.C. § 1344. *United States v. Charles Johnson et al.*, Civ. No. 99-12465-EFH (D. Mass.). Mr. Johnson maintains that he did not know that the land he excavated to create the bogs was wetland and that historic knowledge of long-time area residents would confirm that the relevant area was not wetland. *Wetland Permitting Process* at 57.

Because of financial constraints, the Johnsons were unable to continue to retain counsel in the matter and went *pro se* while the government's motion for partial summary judgment on liability was pending. Motion for Reconsideration at Background, 1–2, *United States v. Charles Johnson et al.*, Civ. No. 99-12465-EFH (D. Mass. Jan. 27, 2005). The Johnsons' principal defense to liability, as indicated in their subsequently filed motion for reconsideration, was that the cranberry bogs in question are remote from navigable waters and the only water flow from their property to the nearest navigable waterway was indirect, through a series of unnavigable (and often unnamed) tributaries. *Id.* at Argument, 6–29. In other words,

1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

their argument is similar to that of the Petitioners that their property is too remote from navigable waters to come within EPA authority under Section 404 of the CWA, as clarified by this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*").

The District Court granted partial summary judgment against the Johnsons on liability by order of May 6, 2004, and summary judgment on remedy by order of January 13, 2005. The Johnsons requested reconsideration by motion and memorandum of January 27, 2005, which the court denied by order of February 16, 2005. On March 22, 2005, the Johnsons filed their notice of appeal to the United States Court of Appeals for the First Circuit. Mr. Johnson believes that the wetland restoration work requested by the government in his case would destroy his cranberry bogs and bankrupt him and his family. *Wetland Permitting Process* at 57–58.

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon a fair balance of regulation in regard to property development and growth. A healthy real estate development climate is a mark of a vital and

vibrant economy and depends on secure rights for property owners. Furthermore, some of NELF's members are directly interested in the issue of real estate development and land use because they are involved in developing, owning, managing, insuring, and/or financing real property.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 2005 WL 711586 (U.S. March 30, 2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Rathbun v. Autozone, Inc.*, 361 F.3d 62 (1st Cir. 2004); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001).

Amici believe that private property and the protection of owners' rights to reasonable development are important building blocks of democracy. As a matter of public policy, the potential for duplicative land-use regulation by both the state and federal governments imposes significant transactional costs on property owners. Because state and local governments have primary jurisdiction over land use, developers often must initially receive approval under local zoning and planning codes (which often include wetlands requirements), and also from state environmental agencies if the development raises wetlands concerns. The "hydrological connection" rule advocated by the United States in this case adds a layer of federal regulation for development involving any wetland, wherever it may be located. Such duplicative regulation

necessarily increases the cost of development, not only because of regulatory delays, but also because of the increased uncertainty effect that results from the regulatory duplication.[2] Because of these significant additional costs of duplicative regulation, many worthwhile development projects will not go forward. Other legitimate projects fully in compliance with local wetlands protections may be stymied by federal regulators. Because states and localities are the principal regulators of land use under the American constitutional system, costly duplicative federal land-use regulation should be limited to circumstances where there is a significant federal issue at stake, as with wetlands adjacent to navigable waters, historically within federal jurisdiction under the Commerce Clause.

Amici Curiæ therefore believe that this brief provides an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, John A. Rapanos *et al.* (collectively, "the

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2 The uncertainty effect is the economic cost to the developer of an application's likelihood of success and possibility of regulatory modification. In other words, the more likely the application is to be approved and the less likely it will have to be modified, the lower the uncertainty effect and the lower the sum that the developer must set aside to account for this uncertainty in projecting the profitability of the project. Conversely, the less likely the application is to be approved without modification, the higher the uncertainty effect and the greater the sum that the developer must set aside to account for uncertainty when making profitability projections (upon which the decision to follow through with the project is based). By its very nature, duplicative regulation increases the developer's economic cost because it adds uncertainty. *See* Graham Bannock *et al., Dictionary of Economics* at 418 (1998).

Rapanoses"). Pursuant to Supreme Court Rule 37.2 (a), counsel for *Amici* has submitted consents by both parties to the filing of this Brief.

Statement of the Case

Amici adopt the Statement of the Case contained in the Brief of Petitioners the Rapanoses.

Summary of Argument

This petition for *certiorari* to the United States Supreme Court deals with the extent of authority of the United States Army Corps of Engineers to regulate the dredging and filling of inland wetlands under the CWA, 33 U.S.C. §§ 1251 *et seq.* ("CWA"). In a recent decision, this Court restricted the Army Corps' authority to regulate inland wetlands under regulations asserting authority to regulate any wetland used as a habitat by migratory birds. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159 (2001) ("*SWANCC*"). Since then, the Army Corps has attempted to avoid the strictures of *SWANCC* by relying on an alternative theory—the "Hydrologic Connection Rule," that would extend regulatory authority to any wetland with a "hydrological connection," direct or indirect, with navigable waters. The Army Corps thereby seeks to retain its authority over virtually all inland wetlands. The United States Court of Appeals for the Sixth Circuit below agreed with the Army Corps. *Amici* argue that this Court's precedents are in accord with the Fifth Circuit's interpretation of the CWA, which limits the Army Corps' authority to wetlands that are adjacent to national navigable waterways. This Court should grant the petition for *certiorari* to resolve to conflict among the circuits as to the extent that the CWA covers inland wetlands.

ARGUMENT

I. The "Hydrological Connection" rule would extend the Army Corps' regulatory authority to all inland wetlands, contrary to this Court's interpretation that the Corps' dredge-and-fill authority is limited to wetlands adjacent to navigable waters.

The CWA gives the Army Corps of Engineers authority to grant permits for work in wetlands, as part of its authorization to regulate dredging or filling activity in "navigable waters." CWA § 404, 31 U.S.C. § 1344 ("Section 404"). This Court last addressed the extent of Army Corps' expansive extension of its Section 404 regulatory authority in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*").

The specific issue in *SWANCC* was the validity of the "Migratory Bird Rule," which, the Corps maintained, extended CWA regulatory authority to waters used as habitat for migratory birds. *SWANCC*, 531 U.S. at 164. Because migratory birds utilize virtually every wetland, the Army Corps used the rule to extend its authority over dredging and filling to virtually all wetlands, no matter how remote from federal navigable waters. This Court in *SWANCC* decided that the Army Corps could not interpret the CWA to grant the Corps the authority to regulate wetlands formed by an abandoned gravel mining operation in metropolitan Chicago, simply because migratory aquatic birds used the site for habitat. *SWANCC*, 531 U.S. at 163, 171–72.

After *SWANCC*, in order to retain their asserted virtually nationwide regulatory authority over inland wetlands, the Army Corps and the EPA sought to limit the scope of that decision to its particular facts and the specific Army Corps policy at issue in *SWANCC*, the "Migratory Bird Rule." Indeed, the Army Corps and EPA have adopted a stated environmental agenda to prevent any conversion of wetlands for property development anywhere in the nation. United States Corps of Army Engineers, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach to Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*, News Release (Jan. 10, 2003), *available at* http://www.usace.army.mil/inet/ functions/cw/hot_topics/admin_affirm_nr.pdf. The adverse effects of the EPA's overly broad and heavy-handed approach to its CWA authority on ordinary citizens was the subject of in-depth discussions during Congressional hearings shortly after the *SWANCC* decision. *See The Wetlands Permitting Process.*[3] To attain expansive authority over nationwide wetlands, the Corps and the EPA have abandoned their prior reliance on the Migratory Bird Rule and have been relying instead on the "Hydrologic Connection" Rule in this and other cases, such as that of *Amicus* Charles R. Johnson. In doing so, they are merely using a different vehicle to reach a result already invalidated by the *SWANCC* decision.

The "Hydrological Connection" Rule is an Army Corps policy, not formally adopted as a regulation,[4] that it will treat

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3 *Amicus* Charles R. Johnson was one of the witnesses at the hearing.

4 The "Hydrological Connection" Rule is an administrative interpretation of the Army Corps' regulation extending its Section

wetlands as "navigable waters" under the Section 404, so long as water from the wetlands flows, however intermittently or indirectly, to navigable or tidal waters. *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). The meaning of "hydrological connection" is open-ended and expansive: Any "[w]aters sharing a hydrological connection are interconnected." *Rapanos*, 376 F.3d at 640.[5]

With certain limited exceptions (primarily the Great Basin area centered on Nevada and Utah)[6] virtually all the

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404 authority to tributaries of navigable waterways. 33 CFR § 300.5 (d). *See In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

5 A number of courts have held that a "hydrological connection" to navigable waters includes connection through groundwater flows. *See, e.g., Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1178–80 (D. Idaho 2001) (interpreting *SWANCC*; "[T]he CWA extends federal regulatory authority over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States."); Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 Envt'l L. 113, 134–35 (2003). In other courts, the EPA has urged a counter-intuitive definition of "hydrologically connected" that would exclude groundwater flows. *See, e.g., In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003); Craig, 33 Envt'l L. at 132–34.

6 The Great Basin includes Utah's Great Salt Lake and California's Death Valley. *See* United States Geological Survey, *Geological Provinces of the United States: Basin & Range Province*, available at http://wrgis.wr.usgs.gov/docs/parks/province/basinrange.html; *Great Basin*, available at http://www.answers.com/topic/great-basin. Precipitation falling in the Great Basin, unlike that in the rest of the nation, stays within the Great Basin watershed and fails to flow ultimately towards either the Atlantic or Pacific Oceans. *Id.*

territory of the United States is within the watershed of either the Atlantic or Pacific Oceans and therefore ultimately hydrologically connected with a navigable waterway. *See Continental Divide*, available at http://answers.com/topic/continental-divide-1&method=6; Columbia Encyclopedia, *Watershed*, available at http://www.bartleby.com/65/wa/watershe.html. Under its logical extension, the "Hydrologic Connection" Rule would expand Section 404 permitting authority to virtually all wetlands in the United States outside the Great Basin area.[7] As noted by the District Court in the companion criminal case to this, however, this Court's decision in *SWANCC* precludes a "Hydrological Connection" Rule because the artificial ponds at issue in that case were hydrologically connected to navigable waters, presumably through groundwater flows:

> It is worth noting that the majority opinion in [*SWANCC*] repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters. *See* [*SWANCC*], 531 U.S. at 176 n.2 (Stevens, J., dissenting). The dissent notes that the wetlands in [*SWANCC*] are at least ecologically connected. *See id.* Despite this, the majority still

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7 A proposed federal regulation addressing post-*SWANCC* Section 404 regulatory authority would have covered approximately eighty percent of all wetlands nationwide. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811, 816 & n. 18 (2003).

> refers to the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence. This leads the Court to conclude that even if there is a hydrological connection, Defendant's wetlands may be considered "isolated" for purposes of the CWA.

United States v. Rapanos, 190 F. Supp. 2d 1011, 1014 n.3 (E.D. Mich. 2002), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). *Accord FD & P Ents., Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, 514 (D.N.J. 2003).

The Sixth Circuit below joined a number of other courts in agreeing with the EPA and the Army Corps in adopting what, *Amici* submit, is an improperly constrained reading of *SWANCC*, limiting it to the invalidation of the "Migratory Bird Rule." *Rapanos*, 376 F.3d at 638. *Accord Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 415 (4th Cir. 2000); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Reuth Dev. Co.*, 335 F.3d 598, 604 (7th Cir.), *cert. denied*, 540 U.S. 1050 (2003); *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 533–34 (9th Cir. 2001). These courts have found the use by the EPA and the Corps of the expansive "Hydrological Connection" Rule to reassert virtually nationwide federal wetland regulation to be a reasonable regulatory interpretation of the CWA. They have dismissed this Court's teachings in *SWANCC* that criticize wide-ranging CWA Section 404 authority as mere *dictum*. *See Rapanos*, 376 F.3d at 638–39.

On the other hand, in reliance on *SWANCC*, the Fifth Circuit has disallowed the "Hydrological Connection" Rule. *See In re Needham*, 354 F.3d 340, 345–46 (5th Cir. 2003) ("[T]he United States may not simply impose regulations over

puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'"). *Accord FD & P Ents.*, 239 F. Supp. 2d at 526. Thus, the Court of Appeals for the Fifth Circuit has given full recognition to the fact that this Court, in *SWANCC*, confined CWA regulatory authority to historically navigable and tidal water bodies and wetlands abutting to them:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But, we conclude that the text of the statute will not allow this.

SWANCC, 531 U.S. at 168 (emphasis in original).

Amici contend that the Fifth Circuit has correctly interpreted *SWANCC* as a persuasive construction of Congress's intent to limit CWA regulatory authority to wetlands immediately adjacent to navigable waters: "[A] body of water is subject to regulation [under the CWA] . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001), *quoted in Needham*, 354 F.3d at 346.

Moreover, statutory history supports restrictive CWA authority over inland waters such as those involved in this case and that of *Amicus* Charles R. Johnson:

> [T]he Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined sec. 404 (a)'s "navigable waters" to mean "those waters of

> the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR § 209.120 (d) (1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." Sec. 209.260 (e) (1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.

SWANCC, 531 U.S. at 168 (emphasis in original).

The Corps made no attempt in this case to show that the Rapanoses' conduct had any adverse effect on navigation or commerce of the nearest navigable waterways. In Mr. Johnson's case, his work to create cranberry bogs advanced agricultural commerce and created new, artificial wetland bogs inland from the Weweantic River. *See* Motion for Reconsideration at Introduction, 2–4, *United States v. Charles Johnson et al.*, Civ. No. 99-12465-EFH (D. Mass. Jan. 27, 2005).

The duplicative administrative burden of seeking federal permission in addition to complying with local requirements limits the ability of the cranberry industry to expand and meet changing consumer needs and advancing agricultural techniques in a rapidly changing marketplace. *See* Julie Jett, *Bitter Fruit: Regulators and cranberry growers have fought series of battles over local bogs*, Patriot Ledger, Feb. 19, 2005, available at http://ledger.southofboston.com/articles/2005/02/19/news/news07.txt (Jeff LaFleur, Executive Director of the Cape Cod Cranberry Growers Association, states that

"deciphering regulations still poses a challenge for growers, and . . . the EPA needs a better appreciation of the environmental purposes bogs serve, such as attracting wildlife and serving as holding pens for flood water. . . [T]hese growers don't get the credit for the land that they are preserving and the wetlands that they own."); Cape Cod Cranberry Growers Association, *Cranberry Industry in Massachusetts*, available at http://www.cranberries.org/thecranberry/stats.html (high regulatory costs hamper profitability of small family families in Massachusetts). In other words, Section 404 regulatory authority over remote inland wetlands like Mr. Johnson arguably harms commerce more than it aids it.

The cranberry industry has been a major economic pillar of Southeastern Massachusetts for centuries. Plymouth County is both the largest cranberry-producing county in Massachusetts and the location of the original Plymouth settlement, so strongly associated with the first Thanksgiving and the use of cranberries to celebrate the annual holiday in its memory. *See* Cape Cod Cranberry Growers Association, *Cranberry Industry in Massachusetts*. Cranberries are the agricultural staple of Carver, in Plymouth County, Massachusetts, the home of *Amicus* Charles R. Johnson and the location of his cranberry bogs. Carver, Massachusetts: *Town of Carver: History*, available at http://www.carverma.org/history.htm (in the 1940s, Carver produced more cranberries than any other town in the world; cranberries remain an important component of the local economy).

For almost two centuries, cranberry growers have created and artificially manipulated their bogs to enhance cranberry production. Cape Cod Cranberry Growers Association, *Cranberry Information*, available at http://www.cranberries.org/thecranberry/tbody.html; Cape

Cod Cranberry Growers Association, *History of Cranberry Production,* available at http://www.cranberries.org/thecranberry/history.html (in 1816 commercial cranberry production started after introduction of technique of depositing sand in bogs to increase production). Farmers flood their bogs in the winter, drain them in the spring, and flood them again for fall harvesting. *Id.*; University of Massachusetts at Dartmouth, Center for Policy Analysis, *Cranberry Water Use,* available at http://www.umass.edu/cranberry/downloads/wateruse.pdf.

In the 1980s and early 1990s, many cranberry farmers, such as *Amicus* Charles R. Johnson, continued and expanded on decades-old techniques to develop their bogs without understanding the newly expansive role that the EPA and Army Corps claimed in regard to inland wetlands. Cranberry bogs are regulated in Massachusetts under the 1985 Water Management Act, Mass. G.L. c. 21G, the Public Waterfront Act, Mass. G.L. c. 91, the Wetlands Protection Act, Mass. G.L. c. 131, §§ 40–40A, and local land-use laws. University of Massachusetts at Dartmouth, Center for Policy Analysis, *Cranberry Water Use.* Mr. Johnson believed that he was in compliance with all local laws. Jett, *Bitter Fruit.* In light of the aggressive prosecutions by the EPA, farmers are now aware of the agencies' asserted authority and are now complying because of the high cost of fighting the agencies' regulatory reach. The legal costs of challenging the Corps and EPA over their claimed wetlands regulatory authority are so high that cranberry growers cannot afford to contest the regulatory claims and many settle because of limited means. Jett, *Bitter Fruit.* The EPA's threat of litigation and assertion of regulatory authority over inland wetlands has been sufficient to force draconian sanctions on some of those cranberry farmers who

settle to avoid litigation. For example, Bruce Dyer, a fellow cranberry farmer who settled with the EPA for an eight-acre restoration plan, did not realize the expense required and sought unsuccessfully to overtturn his consent decree. *Id.*

The high costs of cranberry production, including the heavy regulatory toll, are forcing many cranberry growers to sell their farms for residential development, causing a net loss of open space. Cape Cod Cranberry Growers Association, *Cranberry Industry in Massachusetts* ("Real estate is the cranberry farmer's single biggest asset. Many growers have already sold, or are attempting to sell, any part of their real estate in order to generate cash to meet their financial commitments."). *See* Jett, *Bitter Fruit* (cranberry bogs of Southeastern Massachusetts have been credited with preserving thousands of acres of open space). Unnecessarily duplicative and overly assertive Army Corps and EPA regulation of inland wetlands in Massachusetts is harming not only *Amicus* Charles R. Johnson, but the entire cranberry industry to which he has devoted his life.

As described in the Congressional testimony in the *Wetland Permitting Process,* these adverse effects of unnecessary, duplicative, and occasionally overbearing administrative enforcement have a significant nationwide impact. Therefore, this Court should grant *certiorari* to settle the division among the circuits as to Congress's intent in the CWA with regard to granting the Army Corps and EPA intrusive regulatory powers over inland wetlands remote from any navigable waterway.

II. The dredge and fill permit requirements under Section 404 of the Clean Water Act can extend only to wetlands adjacent to actual navigable and tidal waters.

This Court in *SWANCC* acknowledged that expansive

CWA regulatory authority raised significant constitutional issues on grounds of federalism. *SWANCC*, 531 U.S. at 172–73. The CWA was passed under Congress's power to regulate navigation under the Commerce Clause, Const. Art. I, § 8, cl. 3. *See SWANCC*, 531 U.S. at 168 n.3 (nothing "in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation."). *SWANCC* discussed the implications of states' rights on CWA regulatory authority under the Supreme Court's recent federalism decisions. *SWANCC*, 531 U.S. at 173 ("Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.") (citing *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act)).

Land-use determinations are primarily a state and local concern under federalism jurisprudence: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. The federal government is a government of limited authority under the Constitution. The Commerce Clause cannot be read to extend general police powers to the federal government simply because an activity might have some remote economic consequences. *Lopez*, 514 U.S. at 567–68. The Commerce Clause regulates only "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. Congress's interstate commerce power, therefore, principally permits regulation of navigation and

potential navigational impacts through the CWA. *Morrison*, 529 U.S. at 613 ("[T]hus far in our Nation's history [Supreme Court] cases have upheld Commerce Clause regulation of interstate activity only where that activity is economic in nature."). The Commerce Clause does not allow Congress a broad-ranging general authority equivalent to the states' policy powers to protect the environment, a matter traditionally within the purview of the states' supervision of land use. *SWANCC*, 531 U.S. at 173–74.

The "Hydrological Connection" Rule, as applied in this case, asserts federal regulatory authority over all wetlands nationwide that potentially fall in the watershed of either the Atlantic or Pacific Oceans. Proposed government guidelines to address the effect of *SWANCC* would extend federal authority over 80 percent of all wetlands nationwide and environmental advocates urge even broader coverage. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 Ecology L.Q. 811, 816 & n. 18 (2003). Moreover, the EPA and Army Corps have explicitly espoused a goal of no net loss of wetlands nationwide. United States Corps of Army Engineers, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach to Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*. The "Hydrological Connection" Rule comes close to the sort of national land-use ordinance that this Court warned against in *SWANCC*, 531 U.S. at 574. The agencies' interpretation of the CWA would impose a land-use regime where "there never will be a distinction between what is truly national and what is truly local." *United States v. Lopez*, 514 U.S. 549, 567–68 (1995). *See id. at* 565 ("[D]epending on the level of generality, any activity can be looked upon as commercial."). Therefore, this Court should

grant *certiorari* in this matter to consider the significant federalism issues that it raises.

CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioners John A. Rapanos *et al.* for a writ of *certiorari*.

Respectfully submitted,

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